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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of DANIEL and CARYBROOKE MENKO.	B257124
DANIEL MENKO, Petitioner and Appellant, v. CARYBROOKE MENKO, Respondent.	(Los Angeles County Super. Ct. No. MD034894)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Bianchi, Commissioner. Affirmed.

Law Offices of Laurie Peters and Laurie Peters for Appellant.

No appearance by Respondent.

Appellant Daniel Menko appeals from the April 29, 2014 judgment dissolving his marriage to respondent CaryBrooke Menko, awarding CaryBrooke permanent spousal support of $800 per month and not awarding Daniel any child support.[1] Daniel contends it was an abuse of discretion to: (1) not award him child support and (2) award CaryBrooke permanent spousal support in an amount almost identical to what she had been receiving as temporary support. CaryBrooke has not filed a respondent's brief. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Daniel was 31 when he married CaryBrooke on August 23, 1997. CaryBrooke was 28 and had a ninth grade education. She had suffered from Epilepsy since childhood and during the marriage was diagnosed with Lupus. She suffered from reoccurring pulmonary embolisms and severe sight impairment related to the Lupus, degenerative disc disease, "Lynch Syndrome" and related colon cancer. In 1999 or 2000, the couple lived in Ohio when Daniel was arrested for domestic violence and later pled guilty to misdemeanor spousal abuse. Their only child (C.) was born in Ohio in 2000. During a separation in 2000, CaryBrooke obtained a bartender's certificate and worked as a bartender in Ohio, before moving with C. to California. After reconciling with Daniel, CaryBrooke returned to Ohio where she resumed working as a bartender until she had a miscarriage. In 2001, the family moved to Ventura, California, where she worked as a house cleaner until the Lupus forced her to quit. By the time of the couple's permanent separation on November 2, 2007, CaryBrooke had become a certified foster parent and was fostering two children; any money she received for doing so was used to pay the foster children's expenses. Daniel petitioned for divorce on March 18, 2008.

Modified spousal and child support orders entered in February 2011 were based on DissoMasters which indicated CaryBrooke had no monthly income from June 1 through

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[1] To avoid confusion, we refer to husband and wife by their first names. No disrespect is intended.

October 31, 2010; and none as of November 1, 2010. Retroactive to November 1, 2010, the trial court awarded CaryBrooke monthly child support of $632 and temporary spousal support of $808. Daniel's child support obligation ended in late 2012, after he obtained sole custody of C.[2] CaryBrooke continued to receive spousal support of $808 per month.

Daniel and CaryBrooke were both represented by counsel at the trial on January 2 and 3, 2014. They had agreed on all property issues except future spousal and child support, and attorney fees. Daniel, who still had sole custody of C., sought orders that CaryBrooke: (1) pay child support based on an imputed minimum wage income; and (2) seek employment immediately (see *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705, 712 [approving an order advising spouse to become self-sufficient or face legal consequences]). The record does not include any updated DissoMasters, but Income and Expense Declarations for CaryBrooke (dated December 2013) and Daniel (dated January 2014), showed that CaryBrooke's only source of income was her $808 monthly spousal support payments; her monthly expenses included rent of $900, health care costs of $590 and $140 for the visitation monitor. Daniel's average monthly income was $5,051; he lived with his girlfriend, who contributed to household expenses, which included rent of $675, health care costs of $25, plus various other expenses totaling an additional $3,876.

At trial, CaryBrooke testified she obtained a GED in 2011 and since then had been working towards an associate's degree. She planned to get a real estate broker's license so she could hire sales agents to work under her broker's license and receive a percentage of the commissions earned by those sales agents; she had not obtained a real estate sales license because her health conditions prevented her from doing the physical work required of a sales agent. CaryBrooke applied for social security disability in December

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2 An investigation by the Department of Children and Family Services (DCFS) triggered a dependency case, which divested the family court of jurisdiction. That dependency case was apparently dismissed in August 2012, with a termination order awarding Daniel sole physical and legal custody of C., then 12 years old, and giving CaryBrooke weekly monitored visitation.

2013, but was told there would be a two-year wait. In the property settlement, CaryBrooke was to receive $10,000.

After taking the matter under submission, the trial court issued a written Ruling On Submitted Matter on January 6, 2014 (the January 6 Order). Among other things, it found CaryBrooke had no monthly income and her various health conditions prevented her from working.[3] In addition to ordering Daniel to pay permanent spousal support in the amount of $800 per month ($8 less than he had been paying as temporary spousal support), the trial court expressly made "no order for child support, and reserve[d] jurisdiction over this issue. This is based on the fact that [CaryBrooke] has no income, and only has very limited contact with the minor, and all of the minor's needs are presently being met." Judgment of Dissolution was filed on April 29, 2014. Notice of Entry of Judgment was served on April 29, 2014. Daniel timely appealed.

DISCUSSION

A. Child Support

Daniel contends the trial court abused its discretion in not ordering CaryBrooke to pay child support. He makes three arguments: (1) the trial court's failure to state its reason for deviating from the "guideline" formula as required by Family Code section 4056, subdivision (a) requires reversal;[4] (2) the order was contrary to the principles set forth in section 4053; and (3) a minimum wage should have been imputed to CaryBrooke pursuant to section 4058. We find no error.

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[3] The trial court found CaryBrooke received $1,300 to $2,800 per semester from school grants. In her Income and Expense Declaration, CaryBrooke stated she received an average of $233 per month from a Pell Grant (see 20 U.S.C. § 170a). In *In re Marriage of Rocha* (1998) 68 Cal.App.4th 514, 517-518, the trial court found student loans, including amounts in excess of the cost of books and tuition, are not income for child support purposes.

[4] All future undesignated statutory references are to the Family Code.

1. Section 4056

If the amount of the support ordered differs from the guideline amount, section 4056, subdivision (a) requires the trial court to state on the record or in writing the amount of support that would have been ordered under the guidelines, the reason the support order differs from that amount and the reason why the support order is in the child's best interest. Failure to comply with section 4056, subdivision (a) requires reversal, but only if the party dissatisfied with the trial court's compliance brings the error to the attention of the trial court in a timely manner. (*Rojas v. Mitchell* (1996) 50 Cal.App.4th 1445, 1452.)

Daniel contends the child support order must be reversed because the record neither reflects what the guideline amount would have been, nor did the trial court state on the record or in writing its reasons for deviating from the guideline amount or why such deviation would be in C.'s best interest, as required by section 4056. Even assuming error, Daniel did *not* bring the failure to comply with section 4056, subdivision (a) to the trial court's attention in a timely manner. Under *Rojas, supra*, 50 Cal.App.4th at page 1452, he has thus forfeited the issue.

2. Section 4053

The gist of Daniel's challenge to the trial court's failure to order CaryBrooke to pay child support is that placing the entire financial burden of supporting C. on Daniel is contrary to section 4053 We disagree.

Section 4053 sets forth the principles to which trial courts must adhere in making child support orders. Relevant here are:

- "Both parents are mutually responsible for the support of their children." (§ 4053, subd. (b).)
- "Each parent should pay for the support of the children according to his or her ability." (§ 4053, subd. (d).)
- "The guideline seeks to place the interests of children as the state's top priority." (§ 4053, subd. (e).)

- "The guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated by the guideline formula." (§ 4053, subd. (k).)

The trial court's decision not to order CaryBrooke to pay child support is not contrary to these principles. Its stated reason for the challenged order was "the fact that [CaryBrooke] has no income, and only has very limited contact with the minor, and all of the minor's needs are presently being met." Implicit in this statement is a finding that CaryBrooke did not have the current financial ability to pay any child support (see § 4053, subd. (d)), but might in the future (thus, the reservation of jurisdiction), and that C.'s best interest would be best served by giving CaryBrooke additional time to develop her earning capacity. We find no abuse of discretion in this application of the section 4053 principles to the facts of this case.

3. Section 4058

Also without merit is Daniel's argument that it was an abuse of discretion to not impute a minimum wage to CaryBrooke pursuant to section 4058, because CaryBrooke's desire to obtain a real estate broker's license sometime in the future does not negate her present child support obligation.

We review the decision whether to impute income for abuse of discretion. (*In re Marriage of Schlafly* (2007) 149 Cal.App.4th 747, 753; *State of Oregon v. Vargas* (1999) 70 Cal.App.4th 1123, 1126 (*Oregon*).) We apply the substantial evidence standard to review of the trial court's factual determinations. (*Schlafly*, at p. 753.)

The trial court has discretion to reduce a low-income parent's child support obligation to zero. (*City and County of San Francisco v. Miller* (1996) 49 Cal.App.4th 866, 867; § 4055, subd. (b)(7).) Alternatively, it may impute income to an unemployed parent to determine that parent's child support payments. (§ 4058, subd. (b) [trial court has discretion to "consider earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children"].)

But income can only be imputed to a parent who has "earning capacity." (*Oregon, supra*, 70 Cal.App.4th at p. 1126.) "Earning capacity" is comprised of ability and opportunity to work. "Ability to work" depends on the parent's age, health, education, skills, qualifications, work experience, occupation and background. (*In re Marriage of McHugh* (2014) 231 Cal.App.4th 1238, 1246.) "Opportunity to work" depends on whether there is substantial evidence of a " 'reasonable "likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income." [Citation.]' [Citation.]" (*Ibid*.)

Here, implicit in the trial court's denial of Daniel's request to impute a minimum wage to CaryBrooke is a finding that CaryBrooke had no earning capacity; in other words, no ability to work and/or no opportunity to work. That finding is supported by the evidence of CaryBrooke's poor health and lack of education, which together were sufficient to establish that CaryBrooke did not have the ability to work at a job which would require physical labor. Husband's suggestion that CaryBrooke could resume working as a bartender is contrary to the evidence of her poor health.

B. Spousal Support

Daniel contends the trial court abused its discretion in awarding spousal support of $800 per month. He argues the order: (1) failed to take into account C.'s best interests; and (2) it was arbitrary because it was only a few dollars less than the temporary support order. We find no error.

1. C.'s best interests

Daniel argues that the trial court abused its discretion by failing to consider C.'s best interests as its "primary factor in awarding spousal support." The law is to the contrary. Unlike a child support order, "a spousal support award does not require the court to consider the children's best interests. [Citation.] Rather, it requires the trial judge to balance a number of different factors, as enumerated in" section 4320. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 308.) One such factor is "[t]he ability

of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party." (See *In re Marriage of Mosely* (2008) 165 Cal.App.4th 1375, 1390 [child's best interests are not "utterly irrelevant"].) Even to the extent section 4320, subdivision (g) makes the child's best interests a factor, that subdivision is not relevant here since CaryBrooke did not have custody of C. In any case, it is within the trial court's discretion to decide what weight to give each factor. (*Cheriton*, at p. 308.)

2. The Spousal Support Order Was Not Arbitrary

Also unpersuasive is Daniel's argument that reducing spousal support from $808 to $800 "shows the ruling was arbitrary. In fact, . . . the trial court interrupted the proceedings to fill in what appears to be a form regarding" the section 4320 factors.

Regarding the trial court's interruptions to ask its own questions of the spouse on the witness stand and/or the other spouse, such informal procedures are common in family law proceedings. (See *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1354 [recognizing that some informality and flexibility have been accepted in marital dissolution proceedings].) It is the reason why Daniel and CaryBrooke were both sworn as witnesses at the beginning of the proceeding, and not only after they were called to the witness stand. We turn next to the similarity between the amounts of temporary and permanent spousal support.

Temporary spousal support is usually higher than permanent support because temporary support is intended to maintain the status quo prior to the divorce. (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 522 (*Schulze*) [use of temporary support figure was error because it did not take into account the § 4320 factors].) Permanent support orders will usually be lower because post-dissolution, each party will not have the same access to the whole of the marital property he or she had during the marriage. (*Id*. at p. 525.)

The permanent order must be the product of a truly independent exercise of judicial discretion based on consideration of each factor enumerated in section 4320. The

record must show that the trial judge "arrived at the permanent figure from the ground up rather than using the temporary figure as a kind of baseline or 'lodestar.' Section 4320 requires an independent evaluation of all of a variety of specifically enumerated factors. If the trial judge begins with the proposed temporary figure and then makes adjustments (or merely uses some of the section 4320 factors to justify a figure based on the temporary order), the ultimate order is not really the product of a truly independent exercise of judicial discretion." (*Schulze*, *supra*, 60 Cal.App.4th at pp. 526-527.)

That the trial court arrived at the permanent figure "from the ground up" in this case is demonstrated by the questions it asked during the trial, each of which was relevant to one or more of the section 4320 factors. For example, it asked the parties their age, the dates of marriage and separation and their characterization of the marital standard of living. (§ 4320, subds. (d) [needs of each party based on the marital standard of living], (f) [duration of the marriage], (h) [age and health].) It asked CaryBrooke when she got her GED, whether she had a real estate sales license (§ 4320, subd. (a)(1) [supported spouse's marketable skills]), about her health conditions (§ 4320, subd. (h) [age and health]) and about her Pell Grants (§ 4320, subd. (d) [the needs of each party]). It asked Daniel about his employment at the time of separation and afterwards. (§ 4320, subd. (c) [supporting party's ability to pay].) It asked Daniel how much he was currently paying in spousal support and for how long he had been paying that amount. (§ 4320, subd. (c) [supporting party's ability to pay], (k) [balance of the hardships to each party].) It asked whether CaryBrooke was the victim of the domestic violence charge of which Daniel was convicted. (§ 4320, subd. (m) [criminal conviction of abusive spouse].) It asked whether CaryBrooke could obtain health insurance under the federal Affordable Care Act or Medi-Cal. (§ 4320, subds. (d) [needs of each party], (h) [health], (k) [balance of hardships], (n) [any other factor the trial court determines is just and equitable].) Thus, the record is clear that the trial court considered each of the relevant factors. Under these circumstances, the similarity between the awards of temporary and permanent spousal support is the product of different considerations even though the amounts are similar.

C. Trial Court Bias

Since we find no error requiring remand, we need not address Daniel's contention that the matter should be remanded to a different trial judge because Judge Bianchi demonstrated bias against Daniel and in favor of CaryBrooke during the trial.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.